



NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

ALLEN B. SHAY,

Debtor.

Case No.: 2:12-bk-26069-RK

Chapter 7

**MEMORANDUM DECISION AND
ORDER DENYING DEBTOR'S MOTION
FOR STAY PENDING APPEAL**

Pending before the court is the motion of Debtor Allen B. Shay ("Debtor") for a stay pending appeal ("Motion"), Electronic Case Filing Number ("ECF") 188, of the Order Granting in Part and Denying in Part Motion of Chapter 7 Trustee for Order: (1) Authorizing Sale of Real Property Free and Clear of Liens; (2) Approving Overbid Procedure; (3) Approving Payment of Real Estate Brokers' Commissions; (4) Finding Purchasers are Good Faith Purchasers; and (5) if Necessary, Directing the United States Marshal to Evict the Debtors and any Third Parties from the Real Property (the "Sale Order"), ECF 191, which came on for hearing before the undersigned United States Bankruptcy Judge on January 11, 2017 at 2:30 p.m. Debtor filed a supplemental brief to his Motion, ECF 205, and Chapter 7 Trustee Alfred H. Siegel ("Trustee") filed an opposition to Debtor's Motion, ECF 211. At the January 11, 2017 hearing on the Motion,

1 Andrew Edward Smyth, of SW Smyth LLP, appeared for Debtor. Anthony A. Friedman,
2 of the law firm of Levene, Neale, Bender, Yoo & Brill L.L.P. appeared for Trustee.

3 Having considered the Motion, the opposition, Debtor's supplemental brief, the
4 oral argument of the parties at the January 11, 2017 hearing on the Motion, and the
5 record before the court, the court denies the Motion for the reasons stated herein.

6 **BACKGROUND**

7 On May 7, 2012, Debtor commenced this bankruptcy case by filing a voluntary
8 petition for relief under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. ECF
9 1. On June 12, 2012, Debtor filed his first amended schedules, ECF 11, and on June 21,
10 2012, Debtor filed his second amended schedules, ECF 14. Debtor's Second Amended
11 Schedule A disclosed eight real property interests, including an interest in real property at
12 1175 Pine Bluff Drive, Pasadena, California ("Pine Bluff Property"). *Id.* at 5. On January
13 16, 2013, Trustee filed a Notice of Intention to Abandon Assets (LBR 6004-1) ("Notice of
14 Intent to Abandon"), ECF 42, whereby Trustee stated his intention to abandon Debtor's
15 eight real property interests, including the Pine Bluff Property. Significantly, the proof of
16 service attached to the Notice of Intent to Abandon did not list all creditors as having
17 been served with the Notice of Intent to Abandon. *Id.* at 4.

18 On August 28, 2015, Janet Hurren, a former tenant of Debtor, filed a Notice of
19 Opposition to Abandonment of Real Property and Request for a Hearing, ECF 96, which
20 argued, among other things, that Ms. Hurren is a creditor of Debtor's bankruptcy estate
21 because Debtor was in possession of Ms. Hurren's security deposit, and further, that Ms.
22 Hurren never received a copy of, and was not aware of, Trustee's Notice of Intent to
23 Abandon. Trustee then filed a Notice of Hearing on Notice of Proposed Abandonment of
24 Property of the Estate Filed by Chapter 7 Trustee, ECF 98, which set the Notice of Intent
25 to Abandon for hearing before the court on September 29, 2015.

26 At the September 29, 2015 hearing, Debtor Allen B. Shay appeared on behalf of
27 himself as a self-represented party, and Anthony A. Friedman, of the law firm of Levene,
28

1 Neale, Bender, Yoo & Brill L.L.P. appeared for Trustee. Creditor Janet Hurren appeared
2 on behalf of herself as a self-represented party. At the conclusion of the September 29,
3 2015 hearing, the court continued the hearing on the Notice of Intent to Abandon to
4 December 8, 2015. ECF 105. On November 19, 2015, Debtor filed a reply to Trustee's
5 Notice of Hearing on Notice of Proposed Abandonment of Property of the Estate and
6 argued that the Pine Bluff Property should be abandoned.

7 At the December 8, 2015 hearing, Anthony A. Friedman, of the law firm of Levene,
8 Neale, Bender, Yoo & Brill L.L.P. appeared for Trustee. Debtor Allen B. Shay appeared
9 for himself as a self-represented party. On December 11, 2015, the court entered its
10 Order Denying as Ineffective that Certain Notice of Proposed Abandonment of Property
11 of the Estate Filed by Chapter 7 Trustee on January 16, 2013 [Docket No. 42], ECF 127,
12 which determined that Trustee's Notice of Intent to Abandon was ineffective because it
13 was not served on all creditors of the estate and that the estate assets sought to be
14 abandoned under the Notice of Intent to Abandon, including the Pine Bluff Property,
15 remained property of Debtor's bankruptcy estate subject to the sole and exclusive
16 administration of Trustee.

17 After the original bidders, Dmitry Tubis and Helen Kizler, offered to purchase the
18 Pine Bluff Property for \$1,200,000, following auction at the December 13, 2016 hearing
19 on the sale motion, the court orally granted and approved the sale to the overbidders,
20 Ken Huynh and Kristian Luong ("Buyers") based on their offer of \$1,353,000, then
21 entered the Sale Order reflecting its oral ruling on December 27, 2016.

22 DISCUSSION

23 A stay pending appeal is an exercise of judicial discretion dependent on the
24 circumstances of the particular case. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir.
25 2012). The exercise of such discretion is guided by four factors:

26 (1) whether the stay applicant has made a strong showing that he is likely to
27 succeed on the merits; (2) whether the applicant will be irreparably injured
28 absent a stay; (3) whether the issuance of the stay will substantially injure

the other parties interested in the proceeding; and (4) where the public interest lies.

Id., citing, *Nken v. Holder*, 556 U.S. 418 (2009); *California Pharmacists Association v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009)(same factors). “The party requesting a stay bears the burden of showing that the circumstances justify the exercise of [the court’s] discretion. *Lair v. Bullock*, 697 F.3d at 1203, quoting, *Nken v. Holder*, 556 U.S. at 433-434. The first two factors of likelihood of success on the merits and irreparable harm are the most critical. *Id.* Although this test is not elemental, the party seeking a stay must always satisfy the first two factors. *Nken v. Holder*, 566 U.S. at 435. (“Once an applicant satisfies the first two factors, the traditional inquiry calls for assessing the harm to the opposing party and weighing the public interest.”).

I. Debtor’s Likelihood of Success on the Merits

As the Ninth Circuit stated in *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011), the factor of likelihood of success on the merits is also referred to as requiring a “substantial case for relief on the merits,” although taken in context it is clear as explained in *Leiva-Perez* that the exact phrasing of this concept is not as important as the general idea that the appellant’s chances are more than negligible but less than likely. *Leiva-Perez*, 640 F.3d at 967-968; see also, *In re North Plaza, LLC*, 395 B.R. 113, 121 (S.D. Cal. 2008), quoting, *County of Alameda v. Weinberger*, 520 F.2d 344, 349 n. 12 (9th Cir. 1975) (“[s]howing a ‘likelihood of success’ requires that the movant raise questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate inquiry.”).

An appeal of an order approving a sale is reviewed for an abuse of discretion. *In re Lewis*, 515 B.R. 591, 594 (9th Cir. BAP 2014). “A district court abuses its discretion when it makes an error of law, rests its decision on clearly erroneous findings of fact, or when we are left with ‘a definite and firm conviction that the district court committed a clear error of judgment.’” *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009),

1 *quoting, United States v. 4.85 Acres of Land, More or Less, Situated in Lincoln County,*
2 *Montana*, 546 F.3d 613, 617 (9th Cir. 2008).

3 Debtor has not made a strong showing of likelihood of success on the merits.
4 Debtor made several different arguments regarding his basis for stay pending appeal
5 through his Motion, his supplemental brief, and through the oral argument of his counsel
6 at the January 11, 2017 hearing, each of which is addressed in turn. As explained below,
7 because Debtor's arguments do not identify any errors of law, clearly erroneous findings
8 of fact, or any clear error of judgment, Debtor fails to raise questions going to the merits
9 so serious, substantial, difficult and doubtful as to make them a fair ground for litigation
10 and thus for more deliberate inquiry such that the court determines that Debtor has not
11 made a strong showing of likelihood of success on the merits.

12 **A. Debtor's Motion for Stay Pending Appeal**

13 Debtor in his Motion for Stay Pending Appeal argues that that the court erred
14 when it granted Trustee's Motion for Order: (1) Authorizing Sale of Real Property Free
15 and Clear of Liens; (2) Approving Overbid Procedure; (3) Approving Payment of Real
16 Estate Brokers' Commissions; (4) Finding Purchasers are Good Faith Purchasers; and
17 (5) if Necessary, Directing the United States Marshal to Evict the Debtors and any Third
18 Parties from the Real Property ("Sale Motion"), ECF 168, and entered the Sale Order,
19 ECF 191, because the court improperly denied Debtor's \$175,000 claim of homestead
20 exemption under California Code of Civil Procedure § 704.730(a)(3)(C), and although not
21 entirely clear to the court, it appears that Debtor argues that the court erred by applying
22 the wrong exemption amount when determining that there was a reasonable business
23 justification for Trustee's decision to sell the property because if the \$175,000 exemption
24 amount was applied, there would not be net equity to realize for creditors.

25 Nonetheless, at no time during the December 13, 2016 hearing on the Sale Motion
26 or through the Sale Order did the court deny any exemption claim by Debtor. *Sale Order*
27 ("The court does not decide the amount of exemption claimed by Debtor at this time since
28

1 the issue was only raised as to whether the Trustee's sale motion was supported by a
2 reasonable business justification"). Further, Debtor has never claimed an exemption
3 of \$175,000 on the Pine Bluff Property. In Debtor's second amended schedules, the last
4 time Debtor amended his Schedule C, Debtor claimed an exemption of \$5,182.50 under
5 California Code of Civil Procedure § 703.140(b)(5). ECF 14 at 9.

6 At the hearings on the Sale Motion and Debtor's Motion to Compel Abandonment
7 ECF 161, in determining that a sale would yield net equity for creditors, the court
8 thoroughly analyzed several different permutations reflecting various inputs and based
9 thereupon, held that the sale of the Pine Bluff Property was within the reasonable
10 business judgment of Trustee based on its analysis of the projected and actual value
11 from the sale. In considering Debtor's Motion, the court has reviewed its holding and
12 confirms that there was no error in granting the Sale Motion based on the numbers which
13 the court reviews below. Specifically, as detailed below, the court considers whether a
14 sale would yield net equity for creditors based upon the \$5,182.50 homestead exemption
15 actually claimed by Debtor, a \$75,000 homestead exemption that Debtor might be
16 entitled to claim if he amends his schedule C, zero income tax on capital gain as argued
17 by Trustee, income tax on capital gain of \$97,600 as argued by Debtor, the initial
18 proposed bid of \$1,200,000, and the final overbid of \$1,353,000.

19 **i. Net Equity Calculation Based Upon Income Tax on Capital Gain**
20 **of Zero, Homestead Exemption of Zero, and Proposed Bid of**
21 **\$1,200,000**

22 The trustee's calculations of net equity were as follows:

23 Opening bid	\$1,200,000.00
24 Real property tax claim	[\$4,805.15]
25 First trust deed claim	[\$574,382.27]
26 Second trust deed claim	[\$356,517.84]
27 Costs of sale (8%)	[\$96,000.00]

1 Projected net equity \$168,297.74

2 Sale Motion, ECF 168 at 9.

3 **ii. Net Equity Calculation Based Upon \$97,600 Income Tax on**
4 **Capital Gain, Homestead Exemption of Zero, and Proposed Bid**
5 **of \$1,200,000**

6 Debtor argued at the hearing on Debtor's Motion to Compel Abandonment that
7 Trustee did not take into account income taxes on the capital gain from the sale. See
8 Debtor's Supplement to Motion to Compel Abandonment, ECF 177 at 18. Trustee
9 argued that his tax analysis indicated that there was no income tax liability for a capital
10 gain based on the income tax exclusion under 26 U.S.C. § 121 and the adjusted cost
11 basis of the property. *Audio Recording of Hearing on Motion to Compel Abandonment*,
12 December 13, 2016 at 4:25-4:26 p.m. Debtor argued that the income tax liability from the
13 capital gain on the sale was \$97,600, Debtor's Supplement to Motion to Compel
14 Abandonment, ECF 177 at 18 (Debtor's motion to compel abandonment heard and
15 argued at same time as Trustee's Sale Motion), Debtor's Comparative Analysis of Costs
16 to the Estate ("CACE"), Exhibit E to Debtor's Opposition to Trustee's Sale Motion, ECF
17 179, filed on December 8, 2016, and accepting this figure for the sake of argument, there
18 would still be net equity from the sale to pay unsecured creditors in a Chapter 7 case:

19 Income tax on capital gain [\$97,600.00]

20 (Debtor's Supplement to Motion
21 to Compel Abandonment, ECF 177)

22 Adjusted projected net equity \$70,687.74

23 After considering Debtor's tax figure, the court determined that there would be net
24 equity to pay creditors, indicating the reasonableness of Trustee's business judgment to
25 sell the property. See 3 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 363.02[4] at 363-
26 18 - 363-20 and nn. 56 – 65a (16th ed. 2016) ("In determining whether to approve a
27 proposed sale under section 363, courts generally apply standards that, although stated
28

1 various ways, represent essentially a business judgment test. . . . the bankruptcy court
2 reviews the trustee's (or debtor in possession's) business judgment to determine
3 independently whether the judgment is a reasonable one."), *citing inter alia, Committee of*
4 *Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063 (2nd Cir. 1983).

5 **iii. Net Equity Calculation Based Upon \$97,600 Income Tax on**
6 **Capital Gain, Debtor's \$5,182.50 Claimed Homestead**
7 **Exemption, and Proposed Bid of \$1,200,000**

8 Debtor argued that Trustee did not take into account Debtor's homestead
9 exemption on the Pine Bluff Property. ECF 177. Trustee argued that taking Debtor's last
10 claimed homestead exemption of \$5,182.50 as reflected on Debtor's last amended
11 bankruptcy schedules filed on June 12, 2012 into account resulted in net equity from the
12 sale to pay unsecured creditors. ECF 11. Accepting this figure for the sake of argument
13 still showed that there would be net equity from the sale to pay unsecured creditors in a
14 Chapter 7 case:

15 Last stated homestead exemption	[\$5,182.50]
16 Further adjusted net equity	\$65,515.74

17 In the court's view, Trustee could reasonably rely on what exemption amount was
18 actually of record from Debtor's last amended schedules. Debtor argued that he could
19 and would amend his claim of a homestead exemption upwards in the future, and
20 Trustee stated that he would accept that Debtor might be entitled to claim a higher
21 exemption. *Audio Recording of Hearing on Sale Motion*, December 13, 2016 at 4:46 p.m.

22 The court determined that it was reasonable for Trustee to exercise his business
23 judgment to sell the property based on the actual claimed exemption amount,
24 notwithstanding any future claim of a higher exemption, particularly in light of the potential
25 of overbidding at a sale of the property which would realize more value. *Audio Recording*
26 *of Hearing on Motion to Compel Abandonment*, December 13, 2016 at 4:48-4:49 p.m.

**iv. Net Equity Calculation Based Upon \$97,600 Income Tax on
Capital Gain, Debtor's Hypothetical \$75,000 Claimed Homestead
Exemption, and Proposed Bid of \$1,200,000**

Debtor argued that the court should consider a higher amount because he intended to amend his schedules to claim a higher exemption because he was 58 years old and had limited gross annual income as of 2016, and was thus entitled to a homestead exemption of \$175,000 for an individual aged 55 with gross annual income of \$35,000 or less under California Code of Civil Procedure § 704.730(a)(3)(C). *Audio Recording of Hearing on Motion to Compel Abandonment*, December 13, 2016 at 4:07-4:10 p.m. Nonetheless, this argument lacks merit because in a bankruptcy case, an exemption is determined as of the date that the bankruptcy petition was filed, which was May 7, 2012 in this case. *In re Jacobson*, 676 F.3d 1193, 1199 (9th Cir. 2012), *citing*, *White v. Stump*, 266 U.S. 310, 313 (1924) ("Under the so-called 'snapshot' rule, bankruptcy exemptions are fixed at the time of the bankruptcy petition."); *In re Mayer*, 167 B.R. 186, 188 (9th Cir. BAP 1994) ("Exemptions are determined as of the date the bankruptcy petition was filed."), *citing inter alia*, *Owen v. Owen*, 500 U.S. 305 (1991); Debtor's Bankruptcy Petition, ECF 1, filed on May 7, 2012. The record shows that on that date, May 7, 2012, Debtor was four years younger and less than age 55, and his last amended bankruptcy schedules filed on June 21, 2012, indicate that his gross monthly income as of the date of the bankruptcy petition on May 7, 2012 is \$24,491.00, which annualized (\$24,491.00 times 12 months) was \$293,892.00. ECF 14 at 13.

Thus, as a matter of law, Debtor would not be entitled to claim an enhanced homestead exemption of \$175,000 because the record indicates that he did not qualify for any such exemption on the petition date on May 7, 2012. California Code of Civil Procedure § 704.730(a)(3)(C); *see also*, *In re Mayer*, 167 B.R. at 189. At most, Debtor could claim the regular homestead exemption of \$75,000 as a single individual under California Civil Code of Civil Procedure § 704.730(a)(1), which Debtor previously did on

his prior schedules on June 12, 2012, ECF 11 at 10, before he amended them again on June 21, 2012.

If Debtor could claim a homestead exemption of \$75,000 against the sale of the Pine Bluff Property and assuming Debtor's income tax computation of \$97,600 is correct, which Trustee disputes, and no overbidding at the sale, the net equity would be:

Adjusted projected net equity	\$70,687.74
-------------------------------	-------------

Further adjusted net equity	[\$4,312.26]
-----------------------------	--------------

**v. Net Equity Calculation Based Upon \$97,600 Income Tax on
Capital Gain, Debtor's \$5,182.50 Claimed Homestead
Exemption, and \$1,353,000 Overbid**

Assuming Debtor's capital gain figure and currently claimed homestead exemption applied to final overbid amount:

Opening bid	\$1,200,000.00
-------------	----------------

Real property tax claim	[\$4,805.15]
-------------------------	--------------

First trust deed claim	[\$574,382.27]
------------------------	----------------

Second trust deed claim	[\$356,517.84]
-------------------------	----------------

Costs of sale (8%)	[\$96,000.00]
--------------------	---------------

Projected net equity	\$168,297.74
----------------------	--------------

Income tax on capital gain	[\$97,600.00]
----------------------------	---------------

@\$1,200,000.00	
-----------------	--

Adjusted projected net equity	\$70,687.74
-------------------------------	-------------

Additional gain from final overbid	
------------------------------------	--

@\$1,353,000.00	\$153,000.00
-----------------	--------------

Additional costs of sale (8%)	[\$12,240.00]
-------------------------------	---------------

Additional tax on capital gain	
@25.3% (15% federal, 10.3% state) ¹	[\$38,709.00]
Projected net equity from final sale	\$102,051.00
Debtor's currently claimed	
homestead exemption	[\$5,182.50]
Projected net equity from final sale	
after Debtor's actually claimed	
homestead exemption	\$96,868.50

**vi. Net Equity Calculation Based Upon \$97,600 Income Tax on
Capital Gain, Debtor's \$75,000 Hypothetical Homestead
Exemption, and \$1,353,000 Overbid**

Assuming Debtor's income tax figure, a hypothetical exemption of \$75,000 and the actual overbid amount, the computation of net equity is as follows:

Projected net equity after final sale	\$102,051.00
Hypothetical homestead exemption	[\$75,000.00]
Projected net equity after final sale	
after hypothetical \$75,000 homestead	
exemption	\$27,051.00

Even if Debtor may successfully claim a regular homestead exemption of \$75,000, the figure of \$27,051 is based on the assumption that Debtor's argument that his cost basis is lower than Trustee believes and that the tax liability is as high as he estimates is correct. Nonetheless, these computations show that Trustee reasonably exercised his business judgment to sell the Pine Bluff Property to realize the value of the net equity of

¹ The capital gains tax rates came from Internal Revenue Service, IRS Publication 17, Your Federal Income Tax for Individuals (2016) and California Franchise Tax Board, California Forms & Instructions 541: 2015 Fiduciary Income Tax Booklet.

1 the property for the bankruptcy estate based on the present and actual claim of a
2 homestead exemption.²

3 Moreover, Debtor's Motion for Stay Pending Appeal asserts the following issues:

4
5 (2) Did the bankruptcy have jurisdiction under 28 U.S.C. 1334(b) over
the state law claims of the plaintiff without review of the California
Exemption Law?

6 (3) Did the bankruptcy court err when it did not permit Debtor an
Evidentiary Hearing after Trustee raised a presumption regarding a claim or
7 defense for which state law supplies the rule of decision;

8 (4) Did the bankruptcy court err when it did not permit Debtor an
Evidentiary Hearing where documents were introduced that had not been
served on Debtor and used by Trustee as a presumption without having the
9 burden of producing evidence to rebut the presumption;

10 (5) Did the bankruptcy court err in interpreting the United States Tax
code for basis and tax liabilities?

11 (6) Did the bankruptcy court err when it did not permit Debtor an
Evidentiary Hearing and permitted the Trustee a presumption of tax liability
without the present of Trustee's CPA in court or without having the burden
12 of producing evidence to rebut the such presumption.

13 Motion at 3-4. These arguments are not well-taken because the court did not decide and
14 did not need to decide the amount of Debtor's homestead exemption, and for the
15 purposes of deciding the Sale Motion, the court utilized the computations asserted by
16 Debtor in his opposition papers to the Sale Motion, including his figures for capital gains
17 taxes on a sale of the property, and these figures as discussed by the court at the
18 hearing on the Sale Motion and reexamined above demonstrate that a sale as proposed
19 in the Sale Motion would realize net value for the estate to pay creditor dividends in this
20

21 ² In the Sale Order, the court stated that it did take a \$175,000 exemption on the Pine Bluff
22 Property into account when determining that there was a reasonable business justification for
Trustee's decision to sell the property, specifically finding the following: "Even if the court
23 considers the amount of the homestead exemption of \$175,000 claimed by Debtor, there was a
reasonable business justification for the Trustee's decision to sell the property in that there would
24 be net equity to realize for creditors based on the Debtor's own numbers, and based on the
overbidding at the auction of the property, even assuming Debtor's claimed exemption amount,
25 there was net equity realized for the estate in the sale of the property. " *Sale Order* at 5-6. In
reconsidering this statement on the instant motion for stay pending appeal, the court now
26 believes that this statement was an incorrect overstatement in that as the computations would
show a negative net equity if an exemption of \$175,000 were applied, but as shown herein,
27 Debtor cannot make any valid showing that he qualifies for such an enhanced exemption, and
thus, Trustee's sale of the property was a reasonable exercise of his business judgment.
28

1 case and validate Trustee's exercise of his business judgment in selling the property as
2 reasonable. *Audio Recording of Hearing on Sale Motion*, December 13, 2016 at 4:47-
3 4:48 p.m., *citing*, Supplement to Debtor's Motion to Compel Abandonment of the Property
4 Located at 1175 Pine Bluff Drive, Pasadena, California and the Adjacent Raw Land, ECF
5 177; *see also*, *Audio Recording of Hearing on Debtor's Motion to Compel Abandonment*,
6 December 13, 2016 at 4:47-4:48 p.m. *citing*, Supplement to Debtor's Motion to Compel
7 Abandonment of the Property Located at 1175 Pine Bluff Drive, Pasadena, California and
8 the Adjacent Raw Land, ECF 177. Because it is undisputed that, even using the tax
9 figures offered by Debtor, and allowance of a hypothetical homestead exemption of
10 \$75,000, the sale would yield net equity for creditors, the court determined that an
11 evidentiary hearing was unnecessary, and based thereupon, the court now determines
12 that as to these points, Debtor has not met his burden of demonstrating that any errors of
13 law, clearly erroneous findings of fact, or any clear error or judgment were committed by
14 the court, and accordingly, Debtor has not made a strong showing of likelihood of
15 success on the merits with respect to the arguments presented in his Motion.

16 **B. Debtor's Supplemental Brief**

17 Debtor's Supplemental Brief argues that the court erred in granting the Sale
18 Motion because Trustee had effectively abandoned the Pine Bluff Property under 11
19 U.S.C. § 554 in 2013 through Trustee's Notice of Intent to Abandon, and thus, the Pine
20 Bluff Property was no longer property of the estate. While this argument was not raised
21 in Debtor's original Motion, which he wrote as a self-represented litigant, and the
22 argument was first raised in the Supplemental Brief written by his newly retained counsel,
23 the court grants some latitude to Debtor and considers his supplemental argument
24 regarding abandonment. However, after considering this argument, the court determines
25 that it is not well-taken.

26 First, Debtor's argument is an attempt to circumvent the finality of the court's prior
27 ruling in its Order Denying as Ineffective that Certain Notice of Proposed Abandonment of
28

1 Property of the Estate Filed by Chapter 7 Trustee on January 16, 2013 [Docket No. 42],
2 ECF 127, that the Pine Bluff Property was not abandoned through Trustee's Notice of
3 Intent to Abandon. Under *Matter of SK Foods, L.P.*, 676 F.3d 798, 802 (9th Cir. 2012), a
4 bankruptcy court order is considered final where it (1) resolves and seriously affects
5 substantive rights and (2) finally determines the discrete issue to which it is addressed.
6 Because it resolved and seriously affected whether Trustee's Notice of Intent to Abandon
7 was effective and finally determined that discrete issue, the Order Denying as Ineffective
8 that Certain Notice of Proposed Abandonment of Property of the Estate Filed by Chapter
9 7 Trustee on January 16, 2013 [Docket No. 42], is a final order. Further, because no
10 parties appealed that order within the one year window under Federal Rule of Civil
11 Procedure 60(c), incorporated by Federal Rule of Bankruptcy Procedure 9024, that
12 order's determination that Trustee's Notice of Intent to Abandon was ineffective and its
13 finding that all creditors were not served therewith is now law of the case and cannot be
14 challenged through this Motion. *Musacchio v. United States*, __ U.S. __, __, 136 S.Ct.
15 709, 716 (2016) ("when a court decides upon a rule of law, that decision should continue
16 to govern the same issues in subsequent stages in the same case.")(citations omitted).

17 Second, Debtor's argument is based on the erroneous factual premises that (1)
18 Ms. Hurren is not a creditor under the Bankruptcy Code and thus, was not entitled to
19 notice of Trustee's Notice of Intent to Abandon filed and served in 2013 or entitled to set
20 aside any abandonment and (2) that because Ms. Hurren was not a creditor, the Notice
21 of Intent to Abandon was effective. However, in sustaining Ms. Hurren's opposition to
22 Trustee's Notice of Intent to Abandon, the court necessarily determined that Ms. Hurren
23 was a creditor entitled to notice of Trustee's intent to abandon the property under 11
24 U.S.C. § 554 and Federal Rule of Bankruptcy Procedure 6007.

25 Under Federal Rule of Bankruptcy Procedure 6007(a), "Unless otherwise directed
26 by the court, the trustee or debtor in possession shall give notice of a proposed
27 abandonment or disposition of property to the United States trustee, *all creditors* "
28

1 (emphasis added). Regarding whether Ms. Hurren was a creditor, under 11 U.S.C. §
2 101(10), “The term ‘creditor’ means—(A) entity that has a claim against the debtor that
3 arose at the time of or before the order for relief concerning the debtor” Under 11
4 U.S.C. § 101(5), “The term ‘claim’ means—(A) right to payment, whether or not such right
5 is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,
6 disputed, undisputed, legal, equitable, secured, or unsecured” 11 U.S.C. §
7 507(a)(7) recognizes an unsecured claim for individuals who make deposits of money
8 before the commencement of a case in connection with a lease or rental of property. See
9 also, *In re Barakat*, 99 F.3d 1520 (9th Cir. 1996) (recognizing that Chapter 11 debtor
10 landlord’s tenants who pre-petition provided security deposits to debtor landlord had
11 contingent and unliquidated claims).

12 Ms. Hurren is a creditor in this bankruptcy case within the meaning of the
13 Bankruptcy Code because Ms. Hurren was a tenant of Debtor at the property located at
14 80 Arlington Dr., Pasadena, California, from December 2006 to April 2013 who had
15 deposited \$7,500 with Debtor on December 11, 2006, pre-petition, as a security deposit.
16 ECF 205, Exhibit C. At the time Debtor commenced this bankruptcy case on May 7,
17 2012, Ms. Hurren had a contingent and unliquidated claim for payment of her tenant
18 security deposit under California law against Debtor that he was holding as of the petition
19 date as her landlord, and while this claim may not have been payable as of the petition
20 date, it was a claim for payment for purposes of a claim under 11 U.S.C. § 101(5), which
21 is to be broadly construed, and accordingly, Ms. Hurren was a creditor within the
22 meaning of 11 U.S.C. 101(10). See 2 Resnick and Sommer, *Collier on Bankruptcy*, ¶
23 101.05[1] at 101-39 and nn. 10 and 11, *citing inter alia*, *FCC v. NextWave Personal*
24 *Communications, Inc.*, 537 U.S. 293 (2003) and *In re Udell*, 18 F.3d 403 (7th Cir. 1994)
25 (“By fashioning a single definition of ‘claim’ in the Code, Congress intended to adopt the
26 broadest available definition of that term. The Supreme Court has repeatedly reiterated
27 this principle and has declined all invitations to exclude rights to payment from the
28

1 definition of claim.”). Thus, in order to abandon the property, Trustee was required to
2 give notice of his intent to abandon to all creditors, including Ms. Hurren. *Sierra*
3 *Switchboard Co. v. Westinghouse Electric Corp.*, 789 F.2d 705, 709 (9th Cir. 1986) (*citing*
4 Federal Rule of Bankruptcy Procedure 6007 and holding that there is no abandonment
5 without notice to all creditors). Because Ms. Hurren was not aware of Trustee’s Notice of
6 Intent to Abandon until August 17, 2015, ECF 95, under *Sierra Switchboard Co.*, there
7 was no abandonment of the Pine Bluff Property. *Id.*

8 Moreover, even if Ms. Hurren were not a creditor, the court would still determine
9 that Trustee’s Notice of Intent to Abandon was ineffective because not all creditors were
10 served with Trustee’s Notice of Intent to Abandon. A review and comparison of the proof
11 of service attached to the Notice of Intent to Abandon with Debtor’s first and second
12 amended schedules that only a few creditors, but not all creditors, were served with
13 Trustee’s Notice of Intent to Abandon. Accordingly, under *Sierra Switchboard Co.*,
14 because not all creditors were served with notice of Trustee’s intent to abandon, there
15 was no abandonment of the Pine Bluff Property.

16 Additionally, citing 10 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 6007.03[2] at
17 6007-8 (16th ed. 2012), Debtor argues that failure to serve a creditor does not render an
18 abandonment ineffective because such failure allows a creditor to seek relief under
19 Federal Rule of Civil Procedure 60. Debtor further argues that assuming Ms. Hurren was
20 a creditor, her opposition to Trustee’s Notice of Intent to Abandon was untimely under
21 Federal Rule of Civil Procedure 60, and in any event, Ms. Hurren could not have set
22 aside Trustee’s abandonment because she was not a creditor, having no right to
23 payment as of the petition date.

24 The court determines that Debtor’s arguments are fallacious and lack merit.
25 Debtor’s argument based on *Collier’s* that failure to serve a creditor does not render an
26 abandonment ineffective, is not based on what *Collier’s* actually says, which is: “If an
27 abandonment order is entered but is later determined that a party entitled to notice did
28

1 not receive notice, that party may be able to move for relief from the order.” 10 Resnick
2 and Sommer, *Collier on Bankruptcy*, ¶ 6007.03[2] at 6007-9. *Collier’s* does not say what
3 Debtor argues: that failure to give notice of intent to abandon to a creditor does not
4 render an abandonment ineffective. If *Collier’s* said what Debtor argues, it would be
5 contrary to the Ninth Circuit’s holding in *Sierra Switchboard Co.*, that there is no
6 abandonment without notice to all creditors, and which is controlling on this court unlike
7 nonbinding authority such as *Collier’s*. Thus, the court determines that as to the
8 argument that the Pine Bluff Property had already been abandoned, Debtor has not met
9 his burden of proving that any errors of law, clearly erroneous findings of fact, or any
10 other clear error or judgment were committed by the court and accordingly, Debtor has
11 not made a strong showing of likelihood of success on the merits here.

12 **C. Oral Argument at January 11, 2017 hearing**

13 At the January 11, 2017 hearing on the Motion, Debtor argued that the court did
14 not afford Debtor due process because there was no motion requesting a determination
15 that the Pine Bluff Property was not abandoned. *Audio Recording of Hearing*, January
16 11, 2017, at 3:13-3:16 p.m. Although the Motion relates to the Sale Order, Debtor’s
17 argument appears to be that because Debtor was denied due process when the court
18 entered the Order Denying as Ineffective that Certain Notice of Proposed Abandonment
19 of Property of the Estate Filed by Chapter 7 Trustee on January 16, 2013 [Docket No.
20 42], ECF 127, the Pine Bluff Property was abandoned, and thus, the court did not have
21 jurisdiction over the Pine Bluff Property when it approved the sale through the Sale
22 Order. Again, Debtor’s argument is not well taken.

23 First, Debtor has not cited any authority for the proposition that the court could not
24 determine that property was not abandoned through a Chapter 7 trustee’s notice of intent
25 to abandon, or that the court could not award Trustee such declaratory relief. The
26 hearing on Trustee’s Notice of Intent to Abandon came before the court on December 8,
27 2015 because the creditor, Ms. Hurren, as discussed above, filed a notice of opposition
28

1 to the Notice of Intent to Abandon, ECF 96, which she was entitled to do pursuant to the
2 terms of the Notice of Intent to Abandon and Local Bankruptcy Rule 6007-1(e). Although
3 the Notice of Intent to Abandon and Local Bankruptcy Rule 6007-1 provide that an
4 objection must be filed and served not more than 14 days after service of the notice,
5 because Ms. Hurren was never properly served with Trustee's Notice of Intent to
6 Abandon, the court determines that her opposition was timely. The court also observes
7 that Debtor filed a reply to Trustee's notice of hearing on the notice of intent to abandon,
8 ECF 121, and appeared and argued at the December 8, 2015 hearing on the notice of
9 intent to abandon. Debtor was thus afforded the opportunity to argue at the hearings on
10 Trustee's Notice of Intent to Abandon that it was effective, the court considered his
11 written reply to Ms. Hurren's opposition, and the court fully considered his written
12 submissions and oral argument in making its ruling. Accordingly, Debtor was afforded
13 due process through these proceedings.

14 Therefore, the court determines that as to the argument that Debtor was not
15 afforded due process when the court entered the Order Denying as Ineffective that
16 Certain Notice of Proposed Abandonment of Property of the Estate Filed by Chapter 7
17 Trustee on January 16, 2013 [Docket No. 42], ECF 127, Debtor has not met his burden of
18 proving that any errors of law, clearly erroneous findings of fact, or any other clear error
19 or judgment were committed by the court and accordingly, Debtor has not made a strong
20 showing of likelihood of success on the merits here.

21 For the foregoing reasons, the court determines that Debtor has not shown a
22 strong showing of a likelihood of success on appeal, which weighs against granting the
23 Motion.

24 **II. Irreparable Injury to Debtor**

25 The second factor under *Lair v. Bullock* is whether the applicant will be irreparably
26 injured absent a stay. Debtor's only cognizable right in the Pine Bluff Property is the
27 exemption he claimed against the Pine Bluff Property. Even if it was his residence at one
28

1 time, Debtor does not have a per se right to reacquire the Pine Bluff Property, Debtor did
2 not bid on the Pine Bluff Property at the sale, nor has Debtor ever expressed to the court
3 any intention to reacquire the Pine Bluff Property from Trustee. Debtor's claimed
4 exemption against the Pine Bluff Property of \$5,182.50 is adequately assured by receipt
5 of sale funds in excess of this amount.

6 This factor does not favor Debtor since when he filed this Chapter 7 bankruptcy
7 case, Debtor knew or should have known that Trustee would be liquidating his
8 nonexempt assets to pay creditors, which would include available nonexempt equity in
9 the Pine Bluff Property. While Debtor feels that losing his residence is an irreparable
10 injury, this is something that was more directly caused by Debtor filing his bankruptcy
11 petition then by Trustee's sale. Although Debtor will lose his right to attempt to reacquire
12 the Pine Bluff Property from Trustee, something that Debtor has not demonstrated any
13 intent of doing, in the court's view, the fact that Debtor will not suffer an injury through the
14 sale that Debtor would not suffer otherwise cuts against a finding of irreparable injury
15 absent a stay pending appeal. Because Debtor's sole cognizable right in the Pine Bluff
16 Property is his exemption, which is protected by the sale, the court determines that this
17 factor weighs against issuance of a stay. *See, In re Frantz*, 534 B.R. 378, 389 (Bankr. D.
18 Idaho 2015), *citing inter alia, Klein v. Chappell (In re Chappell)*, 373 B.R. 73, 77-82 (9th
19 Cir. BAP 2007) (discussing extent of debtor's interest under a federal homestead
20 exemption, and noting that it does not extend to the entirety of the residential real
21 property, stating *inter alia* "the debtor's property remains property of the estate to the
22 extent that its value exceeds the statutory amount which the debtor is permitted to
23 exempt.").

24 **III. Substantial Injury to Other Interested Parties**

25 The third factor for stay pending appeal is that issuance of a stay will substantially
26 injure other parties in the proceeding. Imposing a stay will result in potential harm and
27 prejudice to creditors of the estate due to the delay in administration of the estate, and
28

1 the potential loss of the sale of the Pine Bluff Property. Further, a stayed sale will also
2 expose the estate to additional costs to secure and maintain the Pine Bluff Property for
3 the duration of the appeal. Moreover, it is undisputed that Debtor has not been paying
4 mortgage loans on the Pine Bluff Property, and thus, increasing the mortgage debt on the
5 property, draining the remaining equity in the Pine Bluff Property and continuing the
6 estate's risk of loss to foreclosure by the mortgage lenders. *See, e.g., In re Frantz*, 534
7 B.R. at 390. Because closing the present sale is in the best interests of the estate and its
8 creditors because value is realized from the sale to pay creditors without risk of
9 foreclosure by the mortgage lenders, and a stay of the sale would put the estate's value
10 in the property at further risk, incur additional expenses to the estate pending resolution
11 of Debtor's appeal, and further lead to a deterioration of the available equity in the Pine
12 Bluff Property due to the mounting unpaid mortgage debt, the court can find that there is
13 substantial harm to Trustee and the estate he represents if a stay pending appeal is
14 imposed. Accordingly, the court determines that this factor weighs against issuance of a
15 stay pending appeal.

16 **IV. Public Interest**

17 The fourth factor for stay pending appeal based on the public interest is not
18 applicable here and does not weigh for or against a stay pending appeal. *See, In re*
19 *Frantz*, 534 B.R. at 390.

20 **CONCLUSION**

21 In conclusion, as discussed above, the court determines that Debtor has not
22 demonstrated that any of the *Lair v. Bullock* factors, most notably, the two critical factors
23 of showing a likelihood of success on the merits and irreparable harm if stay pending
24 appeal is not granted, weigh in favor of imposing a stay pending appeal. For the
25 foregoing reasons, the court denies the Motion.

26 ///

27 ///

1 Having ruled on the Motion, the further hearing on the Motion set for January 18,
2 2017 at 2:00 p.m. is hereby vacated. No appearances on the Motion are required on
3 January 18, 2017.

4 IT IS SO ORDERED.

5 ###
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

23 Date: January 18, 2017



24 Robert Kwan
25 United States Bankruptcy Judge
26
27
28